



**Department of Energy**  
Richland Operations Office  
P.O. Box 550  
Richland, Washington 99352

June 21, 2016

CERTIFIED MAIL

Mr. Jacob Marx  
Project on Government Oversight  
1100 G Street Northwest  
Washington, DC 20001

Dear Mr. Marx:

**FREEDOM OF INFORMATION ACT REQUEST (FOI 2016-00553)**

This is an interim response to the request for information that you sent to the U.S. Department of Energy (DOE), Headquarters Freedom of Information Act (FOIA) office seeking the following:

1. The most recent Corrective Action Program for the Waste Treatment Plant (WTP) at the Hanford Site;
2. DOE's October 2015 Managed Improvement Plan Health Check report on Corrective Action Program backlogs; and
3. Bechtel National Inc.'s 2014 self-assessment of its work on the WTP.

We provided you with a response to Item 1 of your request on May 16, 2016, and stated this office was processing Items 2 and 3 of your request and would notify you when our search and review was complete.

In response to Item 2 of your request, we have determined that the document is not an agency record. Documents are considered agency records if two criteria are met: (1) the agency must either have created or obtained the records; and (2) the agency must be in control of the records at the time of the FOIA request. See: *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

As to the first prong, the requested document was created by Bechtel National, Inc. (BNI) and has not been obtained by the DOE. The DOE requested that BNI provide the Managed Improvement Plan (MIP), CCN-262442, dated August 28, 2014. BNI duly transmitted this document to the DOE. The MIP contained a description of performance improvement actions, including efforts to improve corrective action program backlog. The subject document, Managed Improvement Plan Health Check on the Corrective Action Program backlogs, also known as MIP-13, was not required as part of BNI's corrective action plans and was not a required submittal by BNI to ORP. According to the agency's records, the DOE had not obtained MIP-13 prior to the date of the FOIA request for such document. The DOE conducted a search for the document in locations where it would mostly be found, and it has not been found. On this basis, the DOE has not created or obtained the subject document.

As to the second prong, the DOE was not in control of the subject document because it was not in DOE's possession at the time of the FOIA request. The District of Columbia Circuit employs a four-part test to determine the nature and extent of the control exercised by a governmental agency under the second prong of the *Tax Analysts* criteria: (1) the intent of the document's creator to retain or relinquish control over the record; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files. See: *Judicial Watch, Inc. v. Federal Housing Finance Agency*, 744 F. Supp. 2d 228 (D.C. Cir., 2010); *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F. 3d 508, 318 U.S. App. D.C. 274 (D.C. Cir., 1996). The subject document (MIP-13) has not been used, distributed or integrated into the DOE's record files in any way. Therefore, the DOE has never had control of the subject document under the second criteria of the *Tax Analysts* criteria and the four-part test employed by the D.C. Circuit.

The undersigned individual is responsible for this determination. You have the right to appeal to the Office of Hearings and Appeals, as provided in 10 CFR 1004.8. Your appeal shall be filed within 30 days after receipt of this letter. You may submit your appeal by e-mail to [OHA.filings@hq.doe.gov](mailto:OHA.filings@hq.doe.gov), including the phrase "Freedom of Information Appeal" in the subject line. Alternatively, any such appeal may be made in writing to the following address: Director, Office of Hearings and Appeals (HG-1), U.S. Department of Energy, L'Enfant Plaza Building, 1000 Independence Avenue SW, Washington, D.C. 20585-1615. Should you choose to appeal, please provide this office with a copy of your e-mail or letter.

We continue to review documents responsive to Item 3 of your request and will notify you when our review is complete. If you have any questions regarding your request, please contact me at our address above or on (509) 376-6288.

Sincerely,

-Original Signed By-

Dorothy Riehle  
Freedom of Information Act Officer  
Office of Communications  
and External Affairs

OCE:DCR